

motions and trial. The court sincerely appreciates the clarification as the initial motion and briefs were read in a manner which led to the incorrect conclusion that the deadline for designation of experts had been missed.¹ The court apologizes for reaching that conclusion, which is wholly inconsistent with the skill and professionalism of counsel of record. The previous Order (#69) will be withdrawn.

Rather than rule on the motions at this time, a hearing on such motions will be calendared for January 28, 2011, at 3 p.m. in Asheville inasmuch as the parties ultimately seek what would be extraordinary relief from the court. Such hearing will be cancelled if the parties resolve the motions amicably on or before January 27, 2011. In attempting to resolve such issues – which the court believes can be done – counsel should keep the following limitations in mind: (1) continuance from the district court's trial calendar is not a viable option; (2) the motions deadline cannot be moved as it takes into account the time needed for briefing as well as the time needed for resolution of such motions by the district court; and (3) the discovery deadline can be pushed out as far as the motions deadline, but with an understanding that all court-sanctioned discovery must be complete by such date and that such extension will not be the basis of a Rule 56(f) motion, a motion to enlarge the motions deadline, or for the continuance of trial. Finally, while the court understands the complexity and importance of the issues raised both both side in this action, the court would appreciate the inclusion of a concrete plan for the early mediation of this action

¹ Designations of experts are served and not filed, making it difficult to discern when a party designated experts. The second paragraph of defendants' response (#66, at p. 1) led the court to conclude that the designations were not made until December 23, 2010.

before the parties are fully invested in compensating and deposing experts.

Finally, to assist the parties in coming up with a proposed joint plan, the court advises that is not generally adverse to the designation of whatever number of experts are actually needed for proper prosecution or defense of a case; however, designation of experts during discovery is no guarantee that the district court will allow those witnesses to testify at trial or, for that matter, that they are actually experts as opposed to fact witnesses.

ORDER

IT IS, THEREFORE, ORDERED that

- (1) Order (#69) is **WITHDRAWN**; and
- (2) a hearing on plaintiff's Motion for Leave to Designate and Call Additional Expert Witnesses (#64) and the "Consented to Motion to Modify the Scheduling Order to Grant Defendants Additional Time in Which to Designate Expert Witnesses and to Extend Discovery Period" (#67) is **CALENDARED** for January 28, 2011, at 3 p.m. in Asheville; and
- (3) the parties are **ALLOWED** up to and inclusive of January 27, 2011, within which to amicably resolve such motions (within the guidelines herein provided) and submit to the court via CyberClerk a proposed Order modifying the Pretrial Order.

Signed: January 21, 2011

Dennis L. Howell

Dennis L. Howell
United States Magistrate Judge

